1978

Eugene P. Campbel v. Pearl Stagg : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

EUGENE P. CAMPBELL,

Plaintiff and Respondent,

vs.

PEARL STAGG,

Defendant and Appellant.

Case No. 15912

BRIEF OF RESPONDENT

NATURE OF THE CASE

Plaintiff seeks to recover damages for personal injuries sustained in an automobile accident. Defendant claims that the parties had reached an accord and satisfaction prior to trial. Plaintiff contends the release was void or voidable because of the mutual mistake of the parties.

DISPOSITION IN LOWER COURT

The lower court, sitting without a jury, found that the defendant's negligence was the sole and proximate cause of the accident giving rise to plaintiff's injuries and that the plaintiff was not negligent. The court thereupon awarded money judgment with interest and costs to the plaintiff.

The court found that the release agreement entered into between the plaintiff and the defendant was voidable by the plaintiff on the basis of mutual mistake relating to the conditions that prevailed at the time the agreement was executed.

The court determined further that State Farm Mutual Insurance Company was not a necessary party to the action.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks to have the trial court's judgment affirmed.

STATEMENT OF FACTS

The defendant has selectively extracted and set forth facts from the record as if they were the only facts adduced at trial. The plaintiff does not consider as proper the defendant's use of editorial license in failing to account for all the salient facts germane to the trial court's decision. The eristical nature of the defendant's statement of facts tends to confuse and distort the factual foundation relied upon by the trial court in rendering its decision.

The accident giving rise to this litigation occurred on September 9, 1973, approximately two miles west of Price on U.S. Highway 50-6 when the defendant turned her vehicle in front of the plaintiff's vehicle causing the collision in which the plaintiff sustained injuries and property damage. (R. 1-2).

While still at the accident scene, the plaintiff noticed lumps beginning to form on his knee, right wrist and right elbow. (R. 122). At about the same time the plaintiff began to experience pain in his neck. (R. 122). The plaintiff was then transported by the police officer to Carbon Hospital where he was examined by Dr. Gorishek who ordered x-rays and performed a clinical examination upon the plaintiff. (R. 23).

Dr. Gorishek reached a diagnosis of cervical strain (Ex. 39), and accordingly prescribed a muscle relaxant and pain reliever. (R. 17).

It was the doctor's opinion, on September 9, 1973, that the injury was minor and that it would best be treated by conservative care relying on the natural body functions to heal the injury. (R. 17-18). The doctor testified that he thought the condition would be cured within a month or two and that he had no reason, at that time, to suspect a herniated disc at the C-5, C-6 level. (R. 18, 59).

The plaintiff then left the emergency room, with the impression that he was not seriously hurt. (R. 123). Accordingly, the plaintiff arranged for substitute transportation that evening and returned to work the following day. (R. 123).

Mr. Campbell telephoned Mr. LaVell Brown, the State Farm adjustor on September 12, 1973, to make arrangements for transportation during the interim period while he was without a vehicle. (R. 125). During that phone conversation, Mr. Brown asked if Mr. Campbell had received any injuries in the accident and Mr. Campbell replied, "Well, no, I've had x-rays at the Hospital and on my neck, my right arm, up in the shoulder and down to the elbow, or below the elbow is sore, and my left wrist is a little sore and I had a little bump on my knee. That's about all." (Ex. 23, p. 3).

On the basis of that conversation Mr. Brown concluded that Mr. Campbell had only a minor injury (T. 67) and thereupon

reported to his superiors that the injuries received by Mr. Campbell consisted of only "multiple bruises." (T. 68, Ex. 24, 25).

Mr. Campbell went to see Dr. Gorishek again on September 19, 1973. The doctor noted that his condition was "still about the same: soreness in his neck, mostly on the left." (T. 18). The doctor stated that he did not change his diagnosis or have any reason to suspect any additional injury than that observed on September 9, 1973. (T. 18). Accordingly, in response to Mr. Campbell's inquiry as to the seriousness of his injuries, the doctor stated that the healing "would take a little time, maybe a month or two." (T. 125). The doctor then attempted to alleviate some of the discomfort during that time by prescribing a cervical collar. (Ex. 3, T. 45, 46, 124). The doctor summarized his perception by stating that he knew Mr. Campbell had an injury to his neck, but at that time thought it was a minor strain. The exact nature of the injury was unknown to him. (T. 60).

Two days after his visit to Dr. Gorishek on September 21, 1973, Mr. Campbell met with Mr. Brown, the State Farm adjustor. Mr. Campbell stated that at that time he relied on Dr. Gorishek's representations that his injuries were not serious and that he was going to get better in a month or two. (T. 126). In the course of the negotiations, Mr. Brown stated that the company would pay $850.00 for the damage to the car, $400.00 for pain, suffering and injury

and would give an open ended medical and lost wage settlement with a specified upper limit. Mr. Campbell signed the release that evening. (T. 75-84).

Mr. Brown stated that at the time of the settlement that Mr. Campbell advised him that he was okay other than a slight pain in the neck. (T. 76).

The parties decided on an open release form as compared to a set amount form because both parties knew that Mr. Campbell was still seeing the doctor and that complete healing of the injury, according to Dr. Gorishek, would take one to two months. (R. 524, T. 76, 77).

Both Mr. Brown and Mr. Campbell indicated that their settlement was based on the existence of a minor injury that would be cured within a relatively short time. (T. 101, 126, 127, 76, 77). The doctor's report obtained by Mr. Brown from Dr. Gorishek (Ex. 52) on September 28, 1977, led Mr. Brown to conclude that there would be no permanent physical impairment. (T. 82-83).

Mr. Campbell visited Dr. Gorishek again on September 26, 1973, because he was beginning to experience more discomfort in his neck. (T. 129). The doctor felt no need to change his diagnosis at this time. The doctor prescribed another cervical collar and injected xylocaine and cortisone to relieve some of the muscle strain and soreness in his neck. (Ex. 3, T. 19, 45, 46). The doctor at that time felt that Mr. Campbell's pain and discomfort was caused by arthritis aggravated by trauma. (T. 47-8).

The doctor saw Mr. Campbell again on October 30, 1973, and concluded that the findings were still about the same. (T. 20).

On November 13, 1973, Mr. Campbell's condition had significantly deteriorated as evidenced by his complaints of soreness in the arm. (T. 49). The doctor continued treatment with mild sedation for pain. (T. 20). It was at this time that Dr. Gorishek suggested that Mr. Campbell be examined by Dr. Robert H. Lamb, an orthopedic surgeon. (T. 20).

Dr. Lamb saw Mr. Campbell on November 30, 1973, in the Carbon Hospital. (T. 129). Dr. Lamb concluded after the examination that arrangements should be made to admit Mr. Campbell to St. Mark's Hospital in Salt Lake City. (T. 21). On December 7, 1973, before Mr. Campbell's admission to St. Mark's Hospital, Dr. Lamb sent a letter to Dr. Gorishek indicating his diagnosis of nerve root pressure in the cervical spine. (T. 50).

Mr. Campbell was admitted to the St. Mark's Hospital on December 19, 1973, for what he thought to be an exploratory examination. (T. 129). While at St. Mark's, Mr. Campbell was observed by Dr. Dennis Thoen, a neurologist. (T. 177). After conducting a neurological examination which included an electromyography, Dr. Thoen concluded on December 21, 1973, that Mr. Campbell "was suffering from a herniated cervical disc with compression of nerve roots C-5, possibly C-6." (T. 179). The doctor continued conservative treatment

and released Mr. Campbell from the hospital on January 4, 1974. (T. 130).

On February 14, 1974, Mr. Campbell, by letter, notified Mrs. Stagg through her agent, State Farm Mutal Insurance Company of his decision to rescind the settlement agreement and accordingly tendered a cashier's check in the amount of $1,250.00 representing an estimate of the amount of money paid by State Farm Mutual Insurance Company pursuant to the release agreement. (T. 170, Ex. 34).

Contemporaneously with the recission and tender made by Mr. Campbell and subsequent thereto, State Farm paid Mr. Campbell and his creditors for medical expenses and lost wages. (Ex. 68). The payments made by State Farm were made directly to Mr. Campbell and his creditors and were not made through Mr. Campbell's attorney. (Ex. 68). All payments made thereafter by State Farm were made knowing that Mr. Campbell intended to rescind the agreement.

The plaintiff's complaint was then served on the defendant on February 24, 1974. (R. 1-4). The defendant answered on March 15, 1974. (R. 5-8).

From January 4, 1974, through the last of August, 1974, Mr. Campbell's condition worsened and became in his words, "unbearable." (T. 132). He experienced extreme pain in his arms, head, neck and shoulders. (T. 130-2). The doctors concluded that he should be hospitalized for further evaluation and treatment. Mr. Campbell was readmitted to St. Mark's Hospital on September 4, 1974, and was re-examined by Dr.

Thoen who conducted another electromyogram. (T. 180). The doctor concluded from his examination that "there had been no improvement in his C-6 radiculopathy" and that "his EMG was unchanged." (T. 180). The doctor recommended disectomy and fusion as the only reasonable means of relieving Mr. Campbell's symptoms. (T.181). The operation was unsuccessful from a technical standpoint, and Mr. Campbell's condition continued to deteriorate. (T. 134, 135, 182).

Dr. Thoen saw Mr. Campbell again in May of 1977 and from the examination concluded that Mr. Campbell had "a thoracic outlet syndrome, that is the irritation of the nerve bundle that runs from the neck down into the arm." (T.184). Dr. Thoen contrasted his diagnosis with Dr. Gorishek's diagnosis of cervical strain as follows:

> Q. Could the herniated disc itself, could the fact or the truth of a herniated disc, together with the fact or the truth of brachial plexus syndrom or thoraic outlet syndrome be masked or hidden behind the general symptoms of a cervical strain?
>
> A. . . . I'd say that any herniated disc, thoracic outlet syndrome that may result from a hyper extension injury would initially present itself as a cervical strain and would be almost impossible to distinguish one from the other unless one were a neurologist and examined the patient. Neurology may do it but even the average orthopedist I think would have great difficulty doing so.

(T. 190). Dr. Thoen concluded that. . . "Dr. Gorishek may have known the patient had the numbness [in his hands] but may have been unaware of the significance of the numbness. . . . (T.190).

The case was set for trial on October 3, 1977, at which time the plaintiff tendered $4,124.58 plus interest in the amount of $1,332.70 to the defendant pursuant to U.C.A. 78-27-1 and 3. (R. 104).

The defendant, on the first day of the first trial and after the case had been pending for over three years, informed the court that the case could not proceed to trial until the proper parties were named. The Court denied the motion. (Minute Entry dated October 3, 1977, found seven pages after R. 536). Judge Sheya sat without a jury on the first trial and then took the matter under advisement. He subsequently passed away before he rendered his decision, and the action was then transferred to Judge Bennell who reset it for trial on February 23, 1978. The only other reference to an objection on the basis of failure to join an indispensable party appears in the form of an "Objection to Trial" which was submitted by the defendant on January 18, 1978, approximately 30 days before the second trial. (R. 220). By the rules of the court, the motion was not scheduled for hearing until the date of trial at which time the court denied the defendant's motion.

ARGUMENT

POINT I

STATE FRAM MUTUAL INSURANCE COMPANY IS NOT AN INDISPENSABLE PARTY TO A DETERMINATION OF THE VALIDITY OF THE RELEASE BETWEEN APPELLANT AND RESPONDENT.

A. The respondent did not enter into a release agreement with the appellant's insurance company and, therefore, the company has no independent standing as a party in this action.

The appellant's argument that State Farm is an indispensable party in this action is indeed enigmatic. The argument is premised on the allegation that the respondent entered into a release contract with appellant and with appellant's insurance company. (Appellant's Brief, p. 15). It is with this premise that the respondent first takes issue.

The language of the release agreement is fully set out in the Record. (R. 7).

In essence, the agreement requires Mr. Campbell to release all persons from any claims, demands, etc. arising from the accident in question in return for the consideration outlined in the agreement. This peculiar drafting of the release agreement requires a litigant to sort through all the legal entities that could be referred to in the release to garner the real parties to the contract. The respondent is unable to understand the rationale underlying the appellant's argument that of all possible parties named in the release, the insurance company should not only be joined but joined as an indispensable party. At the time of the execution of the release, possible claims existed against the manufacturer and servicer of defendant's auto which allegedly experienced brake malfunction, the state department of transportation who maintained the highway and certain

medical persons, who treated the plaintiff. When the complaint was filed, did all these parties who were unnamed in the complaint have a right to be manditorily joined as indispensible parties? Of course not. The plaintiff's choice of defendants precluded them from any possible liability and thus from any legitimate right to be involved in this litigation.

The respondent fails to see how the appellant's position for mandatory joinder of the insurance company is even as well-founded as a motion to join other possible defendants to this action on the same theory. As compared to the other possible defendants, Mr. Campbell had acquired no cause of action against the insurance company as a result of the accident. The fact that the accident produced no direct liability on the part of the insurance company is a clear illustration of the rationale demonstrating the company's dispensability in this action. The appellant, undaunted, realizing that she is precluded from demonstrating the vulnerability of the insurance company as a defendant on the basis of liability, now attempts to procure the status of a defendant for the company by use of 1) the execution of the release agreement or 2) the existence of the insurance contract signed with Mrs. Stagg.

As to the first area, the execution of the release, it must be conceded that the insurance company cannot acquire liability or interest in this action by Mr. Campbell's release of the insurance company in the agreement. If the

insurance company had no liability before the signing of the agreement, it had none after. If that were not true, the whole world would become necessary parties to this action simply on the basis of their inclusion as a group in the release.

Following from that premise, the release of the insurance company becomes a nullity because Mr. Campbell had no cause of action against the company to release. It has long been held that the surrender of or forebearance to assert an invalid claim or defense will not constitute consideration for a contract. Huberdeau v. Desmarais, 79 Wash. 2d 432, 486 P.2d 1074 (1971); 17 Am. Jr. Contracts, §111. Aside from the release of the non-existant liability, the only other consideration supporting the release agreement is the money paid by the insurance company pursuant to the insurance contract between the company and Mrs. Stagg.

It cannot be denied that State Farm was obligated to Mrs. Stagg by its insurance contract to both defend and pay the claims asserted against her. The insurance company's agent admitted that he negotiated the agreement for and on behalf of the Staggs by reason of his agency with the insurance company. (T. 74). The insurance company cannot now claim that the money paid on behalf of Mrs. Stagg is to be interpreted as the consideration supporting the company's independent right to become a party to this action. It is an elementary principal of law that an agreement to do or the doing of that which a person is already bound to do does

not constitute sufficient consideration for a new promise. Van Tassell v. Lewis, 118 Utah 356, 222 P.2d 350 (1950); Baggs v. Anderson, 528 P.2d 141 (Utah, 1974); Apperson v. Security State Bank, 215 Kan. 724, 528 P.2d 1211 (1974).

The insurance company is involved here only because it is an indemnitor of Mrs. Stagg, and the Company, outside of that relationship, has no cognizable right or interest in this litigation. The money was paid by the company because of an independent contractual obligation which cannot by itself, support the insurance company's own independent standing as a party to the contract.

As set out above, the insurance company is an indemnitor and the right of an indemnitor or a party affected by the possible outcome of litigation does not extend to being joined as an indispensable party. See cases at 59 Am. Jur. Parties, §149. The respondent has failed both to find a case where an insurance company was joined as an indispensable party in this type of case or even a case where a similar motion was made. The closest analogy seems to be the line of cases where the insurance company moved to intervene as opposed to being joined as an indispensable party under Federal Rule 24(a)(2) which is almost exactly identical to U.R.C.P. 24(a)(2).

Kelly v. Pascal System, Inc., 183 F. Supp. 755 (D.C. Ky., 1960), was a case in which the insurance company was denied the right to intervene in an action brought against its insured, in order to determine whether it might rely on

certain defenses in the insurance policy to any claim made against it by the defendant insured. The Court stated that under Federal Rule 24(a)(2), "a party is bound by the judgment only when he may be subject to a plea of res judicata," and that, consequently, the insurer had no right to intervene under the rule. It added that the liability of the insurance company was "only potential and may never arise even though the liability of the insured is fixed in this action." Kelly, supra at 778. See also Slusarski v. United States Lines Co., 28 FRD 338 (D.C. Pa., 1961); Lesser v. West Albany Warehouses, Inc., 17 Misc. 2d 461, 191 N.Y.S. 2d 113 (1959); 84 ALR 2d 141(c), 1414, §34[b]; 44 Am.Jur. 2d Insurance, §1526. State Farm would be subject to all these attacks if it had moved to join. It would be ironical if the company, in this action, could gain indirectly that which it could not obtain directly.

Another line of analogous cases reveals that a third party does not become indispensable to an action to terminate a contract simply because its rights under an entirely separate contract will be seriously affected by the termination. Midland National Bank v. Cousins Properties, Inc., 69 FRD 42 (N.D. Ga., 1975). Likewise, State Farm does not have an interest in this litigation because of its interests in an insurance contract with Mrs. Stagg. Moore, in his commentary states that:

> Although the setting aside of a lease would make impossible the performance of a contract between the lessee and another, it was held

> that the third person was only a proper party and could be joined or not at the option of the plaintiff. [citing cases]. Similarly, in a suit by A to declare its obligations under a contract with B as terminated, C, whose obligations to B under another contract and who will be affected by the status of A's obligations, is not an indispensable party [citing cases].

3A Moore's Federal Practice §19.10. See also 59 Am.Jur. Parties, §149, to the effect that the indemnitor must seek intervention and that even then the right to intervene has been denied an indemnitor.

The appellant's brief is premised entirely on the existence of a contract of release. It seems axiomatic that if the contract of release fails, the theories of the appellant in this regard likewise must fail.

B. State Farm's actual representation in this case obviates any claim of indispensability.

The facts of the case clearly illustrate that State Farm's interests have been represented throughout this action. It was admitted at the first trial of this matter that Mrs. Stagg has, at all times, been represented by Ray H. Ivie who is the attorney for State Farm in the Central Utah area. It was also admitted that Mr. Ivie has been retained by State Farm to represent Mrs. Stagg and that his bill for defending Mrs. Stagg in this action has or will be paid by State Farm Mutual Insurance Company. (Supplemental Record pp. 1-4).

Finally, the respondent took the deposition of Mr. Lavell Brown, the State Farm Mutual Insurance Company's representative, and the respondent's theory concerning the

case should have been readily apparent to the insurance company from the questions propounded to Mr. Brown. (T. 75-77).

Despite these facts, State Farm has made no effort to enter this action by the means available under Rule 24 of the Utah Rules of Civil Procedure. It seems only logical that if the insurance company, an experienced litigator, thought that it's interests were inadequately represented by Mr. Ivie, the company should have sought intervention with other counsel. Instead, the appellant, as if in pursuit of a deliberate plan to invite the Court into error, has allowed the case to go to trial twice without effectually raising the defense until the first day of each trial. The appellant by such action, has undeniably created the circumstances comprising what she conceives as error and yet complains of the results. Such a trial tactic ought not to be countenanced by the Court.

It would be incongruous if the insurance company could, by its manipulations, get two bites out of the cherry. First it sets up a strawman in the form of itself by claiming through its insured that it is a necessary party, which, had it really so believed, it could have been resolved by a timely motion to intervene. It is obvious that the company intended to invite the court into error so that if it lost on liability or damages, it would have a basis for appeal. It is inconceivable that Mrs. Stagg dreamed up this legal

conundrum unbeknown to State Farm. This procedure, therefore, is close to a fraud upon the court.

C. The two trial court judges properly determined that appellant's insurance company was not an indispensable party to this action.

The appellant, informed the court on the first day of trial and after the case had been pending for over three years, that she thought State Farm was an indispensable party. The Court denied the Motion. (Minute Entry dated October 3, 1977, found seven pages after R. 536).

The appellant, then, approximately 30 days before the second trial, submitted an "Objection to Trial" to Judge Bunnell which was based on the failure to join an indispensable party. (R. 220). This motion was not noticed for hearing by the attorney for appellant and therefore, was not heard until trial. Rules 4 and 5 of the Seventh Judicial District.

Rule 12(h) U.R.C.P. states that when the defense of failure to join an indispensable party is made at trial, the motion is to be disposed of as provided in Rule 15(b) "in light of any evidence that may have been received." The procedure employed by the appellant in making the motion was tantamount to presenting the motion on the first day of trial because of appellant's failure to notice the motion for hearing prior to trial.

Rule 15(b) U.R.C.P., independent of Rule 12(h), requires that issues not raised by the pleadings be determined on the

basis of the evidence presented. The record in this case reveals that no evidence was introduced before the trial court by the appellant substantiating State Farm's indispensability nor does the appellant suggest any evidence that went to that issue. In fact, the trial court, as part of its findings of fact, concluded that State Farm was not an indispensable or necessary party to the action. (R. 527).

The Court in Papanikolas Brothers Enterprises v. Sugarhouse Shopping Center, 535 P.2d 1256 (Utah 1975), dealt with a similar case and stated the following:

> The trial court properly refused to dismiss the action when defendants asserted, for the first time, the defense of failure to join an indispensable party, at the trial on the merits. Under Rule 12(h), U.R.C.P., when this defense is asserted at trial, it shall be disposed of as provided in Rule 15(b), in the light of any evidence that may have been received. At the trial, defendants did not adduce evidence sufficient to establish and identify an interest on the part of the alleged "indispensable party," so as to require joinder under Rule 19(a), U.R.C.P.

Papanikolas, supra, at 1258.

It is important to recognize that the only conceivable interest of the insurance company in this case stems from the execution of the release agreement. Yet the issue of the release was raised in this case by the appellant in the form of an affirmative defense. (R. 91-94). Having plead the execution of the release as an affirmative defense, the appellant thereby assumes the burden of bringing forth the evidence and establishing its validity. 66 Am.Jur. Release

§45. The respondent's case does not necessitate the appearance of State Farm as a separately named party. It is the appellant's plea of the affirmative defense that is responsible for what the appellant claims will jeopardize the insurance company's interest. Certainly, the duty of adding and dropping parties as it becomes apparent that the defendant will rely at trial on a deed, contract, promissory note or other document does not rest on the plaintiff, but instead, rests on the party infusing the new issue into the case.

The appellant essentially admits these arguments. The appellant uses a quotation from Houser v. Smith, 19 Utah 150, 56 P. 683, 685 (1899), which states:

> Courts have no right to dispose of and adjudicate upon property rights of persons not parties to the case and strangers to the record, and a judgment rendered against persons not parties to the action, and over whom the court acquired no jurisdiction, is absolutely void as to them.

(Appellant's Brief, P. 17). The appellant characterizes the case as standing for the proposition that if the court adjudicates the property rights of persons not parties and strangers to the record, they are not bound by the judgment. The question then arises that if the adjudication of the court in this matter is, according to the appellant's argument, not binding on the insurance company because they are not parties and are strangers to the record, where is the merit in appellant's argument that the company's interests are jeopardized and thus the company is indispensable. The

appellant must either contend that the insurance company is a stranger to this action and thus unaffected by it or admit that it is represented in some fashion and thus assume the burden to intervene if it feels the representation is inadequate.

The respondent does not seek judgment against State Farm, nor does the respondent rely on a judgment that is binding on State Farm to execute against Mrs. Stagg and, therefore, any issues of indemnity between State Farm and Mrs. Stagg are totally separable from the issues involved between the present parties in this action and can be separately determined. Shields v. Barrow, 17 H. 411 (1854); (Appellant's Brief pp. 16-17).

The only authentic reason advocated by the appellant for State Farm's joinder is the need to bind the insurance company to the judgment in order to allow Mrs. Stagg to seek indemnification from the company for any loss.

Since the appellant's argument is generated by Mrs. Stagg's concern that she be indemnified, Rule 14 U.R.C.P. provides the proper remedy. It states:

> At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. (Emphasis added)

The burden is cast on the appellant, under this rule, to bring the insurance company, as an indemnitor, into the action. After all, it is only in the capacity of an indemnitor

that State Farm has any interest at all in this action.

Since the respondent does not require judgment against the insurance company to execute against Mrs. Stagg and since the appellant contends that any judgment is void as to the insurance company, Houser, supra and Appellant's Brief, p. 16-17, then it follows that Mrs. Stagg is the only person who needs or wants to bind State Farm to any judgment.

This concern of the appellant is beyond any conceivable duty of the plaintiff to remedy.

D. An insurance company should not be joined in a suit involving both tort and contract.

The Court in Armijo v. Ward Transport, 302 P.2d 517 (Colo. 1956) dealt with an action for injuries received in an automobile-truck collision in which the plaintiffs not only joined the truck owner and driver as defendants but also the truck owner's insurer and its adjuster. The district court sustained the insurer's and its adjuster's motions to dismiss the action as to them.

The Supreme Court held that the parties who were dismissed "were not essential or necessary parties to a proper adjudication of the claims of the plaintiffs." Armijo, supra, at 518. The Court reasoned as follows:

> Plaintiff's counsel attempt to do by indirection that which they cannot do directly. We have held that in an ordinary action for damages the insurance carrier cannot be joined in the suit. Crowley v. Hardman Bros., 122 Colo, 489, 223 P.2d 1045; Wheat v. Fidelity & Cas. Co., 128 Colo, 236, 261 P.2d 493. Such being the law in this state the insurance carrier cannot be made a party defendant to the action for damages and to set aside a release when it was not named as a release in the instrument.

Arimjo, supra at 518.

The Court relied on Ferris v. Atlantic, 194 N.C. 653, 140 S.E. 607 where the Court distinguished cases that alleged a conspiracy on the part of the insurance company, its agents and other defendants involving fraud. The Court held that absent a complaint of fraud, the plaintiff had no right to have the insurance company or its agents joined. Arimjo, supra at 519.

The only case cited by the appellant is Pattison v. Highway Insurance Underwriters, 278 S.W. 2d 207 (Tex. 1954). In that case, the plaintiffs alleged that the insurance company through its agents had falsely and fraudulently misrepresented the coverage of the insurance contract and had thus induced the plaintiffs into a settlement agreement. Pattison, supra at 209. The Court stated the general rules as follows:

> The policy of insurance here involved is written on a standard Texas automobile insurance form. It is now well settled that a suit by an injured person against the insurance company before he has obtained final judgment against the insured is prematurely brought; and it is further well settled that a suit by the injured person against the insurer in the same suit in which he attempts to fix the liability of the insured is abatable. Seaton v. Pickens, Tex.Com. App., 126 Tex. 271, 87 S.W.2d 709, 106 A.L.R. 512; Bluth v. Neeson, 127 Tex. 462, 94 S.W.2d 407; Bransford v. Pageway Coaches, 129 Tex. 327, 104 S.W.2d 471. It is ordinarily reversible error in a suit to recover for personal injuries for a plaintiff to get before the jury information that the defendant is protected by insurance. Barrington v. Duncan, 140 Tex. 510, 169 S.W.2d 462.

Pattison, supra at 210.

The Court, followed the rule previously set out that since fraudulent conduct was alleged, the insurance company was a proper party to the action. There are no allegations in the present case of fraud or misconduct on the part of the defendant or her insurance company and, therefore, the insurance company has no right to be joined.

The Court in Christensen v. Peterson, 483 P.2d 447 (Utah 1971), held that an insurer could not be properly joined as a party defendant with a tort-feasor. See also, Young v. Barney, 16 Utah 2d 223, 398 P.2d 873 (1965); Holt v. Bell, 392 P.2d 361 (Okl., 1964).

The Utah Court in Christensen, supra endorsed the holding of Lloyds' of London v. Blair, 262 F.2d 211 (C.A. 10, 1958) where the Court observed that the plaintiff had improperly joined two causes of action. "One sounded in tort, and no contractual right or liability was involved. The other was against a group of insurance carriers; the liability asserted was solely and exclusively contractual. No liability in the nature of a tort committed by the insurance company was involved." Christensen, supra at 448. The Court held:

> . . . The two causes of action were separate and distinct with entirely different bases in law. No single party defendant was liable both as a tort feasor and as contractual obligee for the payment of compensation under an insurance agreement. And the issues as between plaintiffs and the United States on one hand, and as between plaintiffs and the insurance carriers on the other hand, were not identical.

Lloyds, supra at 214.

The Court concluded that there was nothing in the Rules of Civil Procedure or their historical background which would lend support to the view that it was intended or purposed that a suit against insurance carriers for the enforcement of a contractual obligation contained in a policy of insurance could be joined with an action against the United States under the Tort Claims Act." Accordingly, the Court held that "the motion to dismiss the defendant insurance companies should have been granted without prejudice." Christensen, supra at 448.

The Court in Young, supra in commenting on Rule 20 U.R.C.P. stated that:

> First, it will be noted that the rule is permissive. Second, it is generally held that it is not proper to join an action such as the primary one here, which is based on negligence, and therefore, in tort, with one like the claimed supplemental action, which would be in contract and thus based upon a claim of an entirely different character.

Young, supra at 848.

This case likewise presents clearly distinguishable issues. The issues between the plaintiff and defendant are entirely separate from the issues involved between Mrs. Stagg and her insurance company. The trial Court in this action properly recognized that:

> There is only one tort-feasor, the defendant, and any liability on the part of State Farm Fire & Casualty Company is contingent upon the liability of the defendant as provided in the insurance contract between defendant and State Farm Fire & Casualty Company and, therefore, the Court finds that the

> plaintiff would not have to joint State Farm & Casualty Company as a necessary party in order to proceed with this action even though the release in question released both the defendant of her primary liability and State Farm of any contingent liability. (R.505).

POINT II

THE TRIAL COURT PROPERLY DETERMINED THAT THERE WAS A MUTUAL MISTAKE OF FACT BETWEEN THE PLAINTIFF AND LAVELL BROWN AS TO THE NATURE OF THE INJURY SUFFERED BY THE PLAINTIFF, EUGENE CAMPBELL.

A. In equity, the Court may only reverse the findings of fact entered by the lower court if the evidence clearly Preponderates against such findings.

The Utah Supreme Court has recently ruled on the issue in Provo City v. Lambert, 574 P.2d 727 (Utah, 1978). The Court held that the facts entered by the lower court will only be disturbed if the evidence clearly preponderates against those findings. See also, Boz-Lew Builders v. Smith, 571 P.2d 389 (Mont. 1977).

The Utah Court in Kier v. Condract, 25 Utah 2d 139, 478 P.2d 327 (1970), stated that the Supreme Court will review the facts in a case in equity, but will do so in light of the evidence as believed by the trial court and not necessarily as urged upon it from the point of view of the appellants.

The trial court in this case found that:

> The diagnosis of Dr. Gorishek at the time of the accident to the effect that any injury to the neck was slight, not serious, and would be healed in a month or two, becomes immaterial to the

> questions unless the diagnosis of neck injury was known to the plaintiff and Mr. Brown at the time the release was executed. The evidence discloses the following facts regarding the plaintiff during the crucial period between the time of the accident and the execution of the release: some discomfort in the neck region following the accident, bruises and swelling in other parts of his body, a prescription for pain pills and a communication for the doctor on the day of the accident that his injuries were slight and that he would be better in a month or two.
>
> He returned to work at his job on a construction site and continued to work throughout this period. He visited the doctor 10 days after the accident with the same symptoms present and the doctor prescribed a neck collar, more pills and there was no further communication from the doctor to the plaintiff relative to the nature of his injuries. The plaintiff knew that there was something wrong with his neck, but there is no evidence that he knew what was the nature of the injury. The plaintiff contacted Mr. Brown primarily concerned about getting transportation so he could get back and forth to work (some 35 miles one way). The release was signed 12 days after the accident on September 21st . . . Mr. Brown appeared at the meeting where the release was signed with no medical reports except the statements made to him by the plaintiff to the effect that there was no serious injuries. (Exhibits 23, 24 & 25). He did observe that plaintiff was wearing a neck collar. The Court, therefore, finds that there was a mutual mistake of fact as to the nature of plaintiff's injuries and that the release was voidable. (R. 504-5, 526-7).

B. A release will be set aside when, at the time of its execution both parties were laboring under a mutual mistake as to the existence, nature or extent of the injuries suffered by the releasor.

The law in Utah as it applies to setting aside a release of a claim for personal injuries is clearly set out in Reynolds v. Merril, 23 Utah 2d 155, 460 P.2d 323 (1969), which was followed and reaffirmed in the recent case of

Carter v. Kingsford, 557 P.2d 1005 (Utah, 1976). The Supreme Court in overturning the trial court's summary judgment in Reynolds, supra, which dismissed the plaintiff's complaint said:

> We are not here concerned with the question of when the plaintiff's disc was herniated. He has alleged that it resulted from the accident. If he can prove it, and that at the time of signing the release neither party knew about it, he should have that privilege.

Reynolds, at 159.

The pivotal question of fact in a decision to set aside a release of a claim for personal injuries due to a mutual mistake regarding the injury to the releasor, is to "distinguish between an unknown injury and unknown consequences of a known injury." Reynolds, supra, at 156. (Original emphasis). See, also 71 A.L.R. 2d 82, 105 Section 5(b) and Later Case Service. The Utah Courts have firmly adopted the position that a mutual mistake as to the existence, nature or extent of an injury will support setting aside a release, while a mistake as to the consequences of an injury, the nature and extent of which are known, is simply a mistake of opinion and are not grounds to set aside a release. Reynolds, supra at 156, 157.

It is important at the outset to know that the language of the release is not significant with regard to unknown injuries. Reynolds, supra favorably quotes following language from Pirchgestner v. Denver and Rio Grande W. R. Co., 118

Utah 20, 28-29, 219 P.2d 685, 690, (1950), (reversed on other grounds):

> The defendant argued that even if the parties were mutually mistaken with respect to the nature and extent of the plaintiffs injuries, such mistake is immaterial because the plaintiff by the release, discharged all claims and causes of action which he then had or might thereafter have or claim on account of any and all personal injuries whether known or unknown, apparent or unapparent, including complications arising from personal injuries, and that the very basics of the release was that the parties might be wholly mistaken as to the nature and extent of the injuries suffered by the plaintiff. However logical the defendants argument may seem, the authorities are to the contrary. Because a release is as all-inclusive in its terms as legal ingenuity can make it and purports to release all possible claims arising out of an accident and is understood as such by the release for, it will nevertheless be set aside when it can be shown that at the time of its execution both parties were laboring under a mutual mistake as to the extent of the injuries suffered by the releasor. (Citations Omitted). Reynolds, supra at 157.

Further, the Supreme Court favorably quoted from Ranta v. Rake, 91 Idaho 376, 421 P.2d 747, 751 (1967), stating that the majority view, which Utah adopts,

> . . . permits a releasor to avoid release where unknown injuries existed at the time the release was executed though the release invaribly is broad enough to encompass unforseen injuries and though the release was honestly obtained without fraud, over-reaching or undue influence on the part of the releasee.

Ranta, supra at 421 P.2d 751.

The issue in the instant case is: Did plaintiff and the agent for the defendant's insurer execute the "Agreement and Release" while laboring under a mutual mistake as to the

existence, nature or extent of the plaintiffs injuries. Comparing the facts of the instant case to those of Reynolds, supra, and of Carter, supra, will assist in the making of that determination.

In Reynolds, the plaintiff was injured in an automobile accident and immediately contacted his physician. Reynolds was treated for the pains and symptoms which specifically included pain in his neck. Reynolds, supra at 155. Thus, plaintiff specifically knew his neck had been injured and had been treated specifically for the injury to his neck for over three months prior to the signing of the release. Then, after continuing in increasingly severe pain Reynolds was finally referred by his personal physician to a specialist who diagnosed the problem as a herniated disc. Reynolds, supra at 156. A spinal fusion was performed, resulting in a permanent partial disability. Reynolds, supra at 156.

The trial court held, essentially, that if Reynolds knew his neck was injured, and if he was seeing a doctor for the injury to his neck; and if he knew his condition was not healed when he signed the release more than three months after the accident, then he was, therefore, not laboring under a mistake of fact as to his injuries and the release was not voidable. Reynolds, supra at 156, 159. For these reasons, the trial court entered summary judgment for the defendant. Reynolds, supra at 156.

The Supreme Court held that while plaintiff may have known his neck was injured and not yet healed when he signed

the release, if he and the agent did not know the true nature of his injury, i.e., that he had a herniated disc, there would be a mutual mistake sufficient to set aside the release. Reynolds, supra at 159. The Supreme Court set aside the summary judgment to give the plaintiff an opportunity to prove that he had a herniated disc, that it was the result of the accident and that he did not know he had a herniated disc at the time of the release. Reynolds, supra at 159.

The case of Carter v. Kingsford, 557 P.2d 1005 (Utah, 1976), affirmed Reynolds as the law of Utah regarding releases. Carter supra at 1006. The facts of Carter are as follows: Mrs. Carter, the plaintiff was involved in a collision with the defendant. On the day of the accident her doctor diagnosed her injuries as "cervical contusions" or cervical strain, strain of the left shoulder and superficial abrasions. Her x-rays at this time showed degenerative disc disease at C-5/6. The next day she was hospitalized and remained hospitalized for five and one-half weeks. Approximately three months after the accident, while still under her doctors care, Mrs. Carter signed a release. Over four years after the accident and over three and one-half years after the release was signed, Mrs. Carter was again hospitalized and a herniated disc was discovered and a fusion performed. Carter, supra at 1005-1006.

The Court in Carter upheld the plaintiffs release and indicated that the distinguishing fact between Reynolds and

Carter was that in Reynolds ". . . the injury was not noted and not considered in its true light at the time," while in Carter it was. Justice Crockett, in his concurring opinion in Carter, put it this way:

> At the time of the settlement [of Carter] both parties knew that the plaintiff had a serious injury to the cervical area of her back. She had been in the hospital for over five weeks under medical care with the use of the hospital diagnostic facilities including the taking of x-rays. (emphasis added).

Carter, supra at 1007.

Justice Crockett specifically noted the fact that "the x-rays showed 'a slight degenerative disease' of her cervical vertebra". Carter, supra at 1008.

The facts of the instant case are fully set forth in the statement of facts. But generally, it is undisputed that Mr. Campbell, was informed by his physician, Dr. Gorishek, that he had minor injuries - essentially bruises. (R. 17-18). The doctor testified that he thought the condition would be cured within a month or two and that he had no reason, at that time, to suspect a herniated disc at the C-5, C-6 level. (R. 18, 59). The plaintiff left the emergency room with the impression that he was not seriously hurt. (R. 123). Accordingly, the plaintiff arranged for substitute transportation that evening and returned to work the following day. (R. 123).

Mr. Campbell telephoned Mr. LaVell Brown, the State Farm adjuster on September 12, 1973, to make arrangements

for transportation during the interim period while he was without a vehicle. (R. 125). During that phone conversation, Mr. Campbell indicated to Mr. Brown that he had incurred only minor injuries in the accident. (Ex. 23, p.3). Mr. Brown then reported to his superiors that the injuries received by Mr. Campbell consisted of only "multiple bruises." (T. 68, Ex. 24, 25).

Mr. Campbell went to see Dr. Gorishek again on September 19, 1973. The doctor noted that his condition was "still about the same: soreness in the neck, mostly on the left." (T. 18). The doctor stated that he did not change his diagnosis of cervical strain or have any reason to suspect any additional injury than that observed on September 9, 1973, the day of the accident. (T. 18). Accordingly, in response to Mr. Campbell's inquiry as to the seriousness of his injuries, the doctor stated that the healing "would take a little time, maybe a month or two". (T. 124).

The doctor summarized his perception at this time by stating that he knew Mr. Campbell had an injury to his neck, but at that time, the exact nature of the injury was unknown to him. (T. 60).

The appellant tries to draw some significance from the fact that Mr. Campbell continued to experience pain and discomfort. The respondent fails to see the significance of these facts. Dr. Gorishek had indicated to Mr. Campbell

that he could expect to experience one to two months of discomfort while the cervical strain healed. The fact still stands that Mr. Campbell had absolutely no understanding that the continued pain over the one to two months would mean anything more than the existence and healing of cervical strain. (See Appellant's Brief, p. 30-31).

Both Mr. Brown and Mr. Campbell indicated that their settlement was based on the existence of a minor injury that would be cured within a relatively short time. (T. 101, 126, 127, 76, 77). The parties did not enter the agreement on the basis of the non-existence of pain, but in the anticipation that the pain would be alleviated, consistent with the doctor's diagnosis within one to two months.

These facts clearly fit within the facts of Reynolds where Reynolds knew his neck was injured in the same manner but was not disabled and did not consider the injury in its true light at the time of the release. Reynolds, supra at 156, 159; Carter, supra at 1006. The instant facts are readily distinguishable from Carter, where Mrs. Carter was aware she had a serious injury to her neck, was hospitalized for five and one-half weeks immediately after the accident and was aware of x-rays that indicated problems with her vertebral disc at C-5/6 where the fusion later took place.

Further, in Carter, a long period of treatment, more than three and one-half years from the time of the release expired before the herniated disc developed. In Carter, the injury and its serious nature were known, only its prognosis

was mistaken. In Reynolds and in the instant case, at the time of the release, there was no indication of any serious injury and the existence of a herniated disc was unknown and unappreciated. The Supreme Court's use of the distinction to be drawn "between an unknown injury and unknown consequence of a known injury" as delineated in these two cases, clearly support the lower court's finding of mutual mistake. For an analogous case, See, Ranta v. Rake, 421 P.2d 747 (Idaho 1966).

POINT III

PLAINTIFF DID NOT ENGAGE IN SUCH CONTACT AS WOULD UNEQUIVOCALLY INDICATE HIS INTENTION TO RATIFY THE RELEASE AND PLAINTIFF IS THEREFORE NOT ESTOPPED FROM RESCINDING THE RELEASE.

The test for ratification under both state and federal law set out in Union Pacific Railroad Co., v. Zimmer, 87 Cal. App. 2d 524, 197 P.2d 363 (1948):

> The fundamental test of "ratification" by conduct is whether releasor with full knowledge of material facts entitling him to rescind as engaged in some unequivocal conduct giving rise to an inference that he intended his conduct to amount to a ratification. (emphasis added).

The general principal as stated in 66 Am.Jur. 2d, release §27 as follows:

> A release voidable for any reason may be ratified and affirmed by the subsequent acts of the releasor. Some unequivocal act must appear giving rise to an inference that the releasor intended his conduct to amount to a ratification, or that reasonable minds would say that by his acts he must have intended a ratification of release. . . . (emphasis added).

The appellant apparently contends that the acceptance of drafts by Mr. Campbell, and his creditors constituted such action as would unequivocably indicate an intention, by Mr. Campbell to ratify the release. The lower court, when considering that evidence, stated as follows:

> The Court does not feel that acceptance by the plaintiff of drafts in payment of medical expenses and lost wages that approximately the same time that defendants agent received notice of plaintiffs intent to void the release. It is sufficient fact to establish unequivocal conduct that the plaintiff intended to ratify or affirm the release. The tender to return payment and everything transpired thereafter indicated an intent to void the release and not to affirm. (R. 505).

The appellant, by claiming that the acceptance of monies from State Farm after the release was signed constituted ratification is premised on several fundamental flaws.

First, the release was one which anticipated and required the payment of future money.

Second, it was not until the fall of 1974 that the true extent and nature of Mr. Campbell's injuries were known to him, and it was not until the time of plaintiff's letter of February 14, 1974, that plaintiff understood that he might have right to rescind the release. The first requisite, therefore, of the test, i.e., "full knowledge of the material facts," had not been reached until after the acts pointed to by the defendant. Plaintiff then acted with reasonable dispatch to notify the defendant of his rescision.

Third, the conduct of the defendant, taken as of whole does not unequivocally indicate the intention to ratify the

release. On February 19, 1974, a letter and cashier's check for $1,250.00 was sent to the defendant specifically rescinding the release and tendering back the face amount paid for the release. This conduct clearly and unequivocally indicated plaintiffs intention not to ratify the release.

Further, as noted in Watson v. Buggy, 285 S.W. 2d 67, (Mo. 1955), 53 A.L.R. 2d 743 and Later Case Service, and as summarized in the annotation itself: "in the majority of cases a tender back made before the commencement of the action on the claim release has been held timely, even though a considerable period of time may have elapsed between the execution of the release and the offer to return the consideration received." 53 A.L.R. 2d 743 at 769, Section 3 (7).

The Court should also take notice of the fact that the appellant was not subject to any prejudice or induced into any reliance because of the negotiation of drafts by the respondent. The respondent tendered back all monies paid by the appellant and fulfilled his duty of notifying the releasee with reasonable dispatch. The facts seem clear that the plaintiff did not, by unequivocal conduct, affirm or ratify the release, but on the contrary, conducted himself at all times in a manner consistent with his notice of rejection, termination and rescission. (R. 525).

POINT IV

THE TRIAL COURT CORRECTLY ALLOWED INTEREST ON THE SPECIAL DAMAGES AWARD IN THE INSTANT CASE.

Utah law as codified in 78-27-44 U.C.A., 1953, allows a plaintiff who recovers special damages for personal injury to make further recovery of interest at 8% on said special damages. In the instant case, the Court followed the above cited statute and allowed respondent to recover interest at 8% on the award of special damages.

The specific issue before this Court as to the manner of applying 78-27-44 U.C.A., 1953, is whether this procedural matter may be applied retrospectively to allow interest on claims whose judgments are rendered subsequent to the effective date of the statute, but whose underlying cause of action arose prior to the effective date of the statute. The issue cannot be generalized so as to be simply a question of prospective or retrospective application of any statute, procedural or substantive.

In the instant case, the cause of action arose September 9, 1973, and the judgment upon the claim was rendered March 10, 1978. Respondent contends that the court did make a correct application of the statute because the judgment was rendered nearly three years after the May 13, 1975, effective date of the statute, and because the matter of interest is clearly procedural, not substantive.

The governing section, 78-27-44, U.C.A. (1953, as amended), reads as follows:

> In all actions brought to recover damages for personal injuries sustained by any person, resulting from or occasioned by the tort of any other person, corporation, association or partnership, whether by neg-

arises and the Oklahoma state begins at the commencement of the action. Neither of these differences has any bearing on the issue herein.

In Fields, supra, the suit was commenced March 29, 1971, (the statutory time for the beginning of interest accrual) but the statute was not approved until June 16, 1971. A verdict was returned in July 6, 1973, and the trial court refused to add interest.

On appeal, the Oklahoma Supreme Court held that the trial court should have added interest to the judgment. The court's reasoning was based on the fact that because the statutory imposition of interest on a judgment is:

> Procedural rather than substantive, [it] directs allowance of interest on judgments from the time the suit commenced to the date of the verdict, notwithstanding that the suit was commenced prior to the effective date of the legislation. Fields, supra, at 63.

The Fields case was based on a preceding Oklahoma Supreme Court decision in Benson v. Blair, 515 P.2d 1363 (Okla. 1973).

The court in Benson v. Blair, 515 P.2d 1363 (Okla. 1973) answered the question as to the retrospective application of the statute awarding interest on special damage judgments by stating:

> We think that there is retrospective application, of the 6% interest matter. That the legislature may, in its discretion, establish interest that will accrue on a judgment, is, of course, recognized. Sunray DX Oil Co. v. Great Lakes Carbon Corp., supra, That the "interest" here has the effect of

> damages does not affect the matter. Like costs, interest is recoverable by statute (Baldwin v. Collins, (Okl. 1970), 479 P.2d 567), and the legislature has so prescribed it. It is attached by legislative fiat (Foster v. Quigley, (1962), 94 R.I. 217, 179 A.2d 494--a retrospective interest case, and here) and is proper. Not being of the substance of the cause of action (Foster v. Quigley, supra), but being a directive to the trial court, then it becomes a mode of procedure which the court was bound to follow.
>
> Since judgments bear interest as prescribed by 12 P.S. 1971, §727, subd. 2. although the judgments made no provision therefor, and it being a ministerial duty to award interest on a judgment may be corrected by this court on appeal even though the error was not raised in the motion for new trial or petition in error. (Emphasis added).

Benson, supra at 1365.

Other jurisdictions support the above view on the application of interest.

In a case dealing with interest on refunds of tax franchise payments, the California Supreme Court in People of the State of California v. Union Oil Company of California, 310 P.2d 409 (1957), held:

> "A statutory interest right for a particular period depends upon the law in effect at that time . . . Accordingly, plaintiff concedes defendant's right to the interest on over payments for the period prior to July 10, 1947, the effective date of the amendment." (See page 412). (Emphasis added).

For other cases holding similarly see: Ballog v. Knight Newspapers Inc., (1969), 381 Mich. 527, 164 N.W. 2d 19, M.E. Trapp Association v. Tankersly 206 Okl. 118, 240 P.2d 1091. (1941).

The above stated rule is based on the theory that a procedural or ministerial aspect of the law does not induce parties to rely on it to their detriment.

The substantive laws do induce detrimental reliance by the public. This rule has been stated by this Court as follows:

> The rule mentioned is founded on the theory that since every citizen is presumed to be acquainted with the law and to enter into his business transactions accordingly, it would be unjust to permit such legislation to operate retrospectively without a clear statment of the legislature that such was its purpose.

In Re Ingraham's Estate, 106 Utah 337, 148 P.2d 340, 342 (1944).

An example will illustrate that as a practical and theoretical matter the procedural-substantive distinction holds true.

If the substantive law with regard to the standard of care regarding supervision of school physical activities for the students were to be changed and applied retrospectively it would be grossly unfair to schools because they had no opportunity to escalate their level of supervision to match the standard of care imposed by law. The opposite is true with regard to the procedural application of interest. The changing of the law to award interest on judgments will produce no hardship upon the schools in one example. If the schools are meeting their standard of care there will be no interest imposed because there will be no judgment. Interest

would have to be astronomical in order to cause the school to fear a judgment against them enough to supervise under the standard of care.

There is a strong argument that even if the procedural-substantive distinction had not been made by the Court, the statute could still be applied retrospectively on another ground -that of legislative intent.

The Benson case, supra, formulated the issue in terms of intent (though they never expounded on this point) saying:

> (The) question, then, is whether there is . . . intent, clearly expressed, or necessarily implied from the language used that requires retrospective application of the 6% interest matter, (at 1365)

and then held that it did apply retrospectively. The statute construed in Benson, like the Utah statute construed herein, allowed interest going back to a time long before judgment would be rendered, i.e., to the time the cause of action arose (78-27-44 UCA, 1953) and to the time of commencement of the action (12 O.S. 1971, § 727) subd. 2). The statutes did not limit the interest to a time commencing with the effective date of the statute.

It appears then that the legislature intended the interest provision to be applied retroactively, otherwise, the legislature would not have expressly allowed interest bank to the date the cause of action arose instead of the effective date of the statute.

The cases cited by appellant inapposite to the issue of interest on special damages.

Appellant has cited In Re Ingraham's Estate, supra, for the proposition that any legislative enactment operates prospectively only unless expressly declared otherwise. The case does not deal with interest. In Ingraham, supra, however, this court found that there is a distinction between procedural and substantive changes in the law and the time for their applicability. The court said:

> Appellant recognizes this statute and also the general rule that legislative enactments operate prospectively rather than retrospectively, unless expressly declared otherwise. However, appellant urges that the amendment in question (Sec. 80-12-7 Laws of Utah 1943) does not come within the bounds of the general rule stated for the reason that the amendment is an enactment making only procedural changes. We are convinced that the general rule must apply as Sect. 80-12-7, Laws of Utah 1943, is not a procedural enactment, but is substantive in its effect. (at 341).

The general rule was applied above only because the statute was found to be substantive. Procedural statutes, as set forth above, may be applied retroactively.

The McCarrey v. Utah State Teachers Retirement Board, 177 P.2d 725 (Utah, 1947) cited by appellant does not deal with the question of statutorily mandated interest on judgments. The change of law in McCarrey, supra was with regard to the definition and computation of years of teaching service for purposes of retirement and was so clearly substantive that there was no attempt to make the procedural-substantive distinction by either the attorneys or the Court. Hence, the broad language used by the court.

Union Pacific Railroad Co. v. Trustees, Inc., 8 Utah 2d 101, 329 P.2d 398 (1948), cited by appellant does not deal with the question of statutorily mandated interest on judgments. It deals with the substantive law of corporate powers and ultra vires acts. It is necessary to point out again that the case is not good law with regard to a question not considered, that is, retrospective application of a procedural statute.

In conclusion, it is important to note that the judge was duty bound to award interest because the statute in effect at the time of judgment mandated the imposition of interest on special damages given in a judgment. Appellant cannot be said to have relied on this procedural aspect of the law and hence there is no equitable reason to eliminate interest charged to appellant. More importantly, the law is clear that there is a distinction between retrospective application of procedural and substantive law, and interest is a procedural matter which may be applied retrospectively.

CONCLUSION

The two trial judges who heard this case properly determined that State Farm Automobile Insurance Company is not an indispensable party to this action.

The Court determined, upon the clear weight of evidence, that there was a mutual mistake of fact between Mr. Campbell and Mr. Brown. The facts reveal that at the time the release was executed, the exact nature of the injury was not known

to either of the parties. The plaintiff by his conduct did not unequivocally ratify the release but, on the contrary, acted with due diligence to rescind the release agreement and tender back to the appellant and her insurance company the money paid under the release.

The trial court decision to allow interest on special damages was proper in that the statute was procedural and therefore applicable to the judgment in this case.

Respectfully submitted this 11th day of October, 1978.

Jackson Howard

JACKSON HOWARD, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Respondent

MAILING CERTIFICATE

I hereby certify that on the 11th day of October, 1978, I personally mailed two (2) copies of the foregoing Reply Brief of Respondent to Mr. Ray H. Ivie, Attorney for Appellant, 48 North University Avenue, Provo, Utah, 84601.

Marianne Peterson
Secretary